

CONDITIONS IN THE LAW OF CONTRACT¹

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In order to understand any legal system it is necessary to consider the purely *physical facts* of life apart from the *legal relations* that are consequent upon such facts. Legal relations are merely mental concepts which are useful in enabling us to foresee the physical facts of the future. Disregarding the multitudes of facts that have no effect whatever upon existing legal relations, those that remain—the *operative facts*—must be considered and classified. In any case, the best method of procedure is to consider each operative fact separately, and in chronological order, and to determine the legal relations that exist after such single fact.

Thus: *Fact one*: A says to B, "If you will agree to pay me \$100 for this horse you may have him and you may indicate your agreement by taking him." This is a physical fact, called an offer, consisting of certain muscular acts of A (his spoken words) producing certain physical effects in B. The legal relations immediately following are (in part) as follows: B now has the *privilege* of taking the horse and A has *no-right* that he shall not; B has the *power* of making the horse his own by taking him, with the correlative *liability* in A to the loss of his ownership; no new *rights* or *duties* are created and no new *immunities* or *disabilities*; by giving B a privilege and a power, A has lost a previous right and a previous immunity.

Fact two: B says to A, "How old is the horse?" This fact operates to create no new legal relations whatever. The operative legal effect of fact one is still intact.

Fact three: A, knowing the horse to be 12 years old, replies, "6 years." This false representation changes the character of B's power by adding to it; he still has the power to make the horse his own by accepting the offer, but now his acceptance will create in addition the power to "rescind" on discovery of the fraud.

Fact four: B takes possession of the horse. This is the fact called acceptance. It operates at once to create in B all those multitudinous legal relations that are called "ownership" or "title" and to extinguish the ownership of A; also to create a right in A as against B and the correlative duty in B to pay \$100. Because of fact three, B also has the power to restore the legal *status quo* by tendering the horse back.

¹ Certain parts of this article were prepared for the writer's edition of Anson on *Contracts*, soon to be published by the Oxford University Press.

It is thus that each case should be analyzed and the legal relations determined. Any fact that causes new legal relations to exist is an operative fact. Any law book might properly be entitled, therefore, the Legal Operation of Facts.

INTERPRETATION AND CONSTRUCTION OF CONTRACTS

The law of contract deals with those legal relations that arise because of mutual expressions of assent. The parties have expressed their intentions in words, or in other conduct that can be translated into words. The notion is not at all uncommon that legal relations called contractual cannot exist unless the parties intended them to exist, and that the sole function of the courts, therefore, is one of interpretation: What was the intention of the parties? This notion is far from correct. In almost all cases of contract, legal relations will exist, from the very moment of acceptance, that one or both of the parties never consciously expected would exist, and therefore cannot be said to have intended. Furthermore, the life history of any single contract may cover a long period of time, and new facts will occur after acceptance of the offer—facts that may gravely affect the existing legal relations and yet may have been utterly unforeseen by the parties. Many of these un contemplated legal relations are invariably described as contractual. Therefore it appears that a necessary function of the courts is to determine the unintended legal relations as well as the intended ones.²

The first step in this judicial process is the merely historical one of determining what the operative facts were. What did the parties say and do? What words did they use? Did they execute a document? This historical determination is made possible by evidence.

The next step is one of interpretation. In taking this step the court may put to itself two questions: first, what was the actual state of mind of the contracting parties, their meaning and intention at the time they said the words or performed the other acts to be interpreted; second, what meaning do the words and acts of the parties now express to a reasonable and disinterested third party? It is only in exceptional cases that these questions will be consciously considered by a court; usually the process of interpretation will involve rapid and unconscious shifts from the one aspect to the other.

² In *Becker v. London Assur. Corp.* (1918, H. L.) 117 L. T. Rep. 609, construing an insurance contract, Lord Sumner said: "I dare say few assured have any distinct view of their own on the point, and might not even see it, if it were explained to them, but what they intend contractually does not depend on what they understand individually. If it is implicit in the nature of the bargain, then they intend it in law just as much as if they said it in words."

Frequently the only way to arrive at an answer to the first question is to answer the second; in other cases the two may both be susceptible of answer and the two answers may not agree. If the actual intention of the parties is not the same as the meaning that is now conveyed to a reasonable man,³ it is the latter that will more often prevail. If, however, the parties clearly had a common meaning and intention, it will control irrespective of what a third person would have understood.

Often, however, the court cannot solve the problem before it by mere interpretation. The court's problem is to determine the jural relations of the parties as they are now; and these relations depend upon facts, both contemporaneous with the acceptance and subsequent thereto, which were not known or anticipated by the parties and as to which they made no provision that is capable of either sort of interpretation. The question now is, not what is the meaning of words, but what does the welfare of society require in view of these unknown or unanticipated circumstances. To answer this question the court must resort to general rules of law even though they were unknown by the parties, to rules of fairness and morality, to the prevailing *mores* of the time and place. This process may be called one of *judicial construction*. The line separating mere interpretation from judicial construction, although logically quite clear, will always be practically indistinct and difficult of determination, especially because the courts so frequently construct under the guise of mere interpretation.

THE NATURE OF A RIGHT

One of the chief purposes for which parties make an executory contract is the creation of rights and duties. A right is the logical correlative of a duty; the one cannot exist without the other, and neither can exist at all unless there are two individuals living within some organized society.⁴ If for the benefit of A, society commands certain conduct or performance on the part of B and will take some action detrimental to B in case of disobedience, we say that A has a right and B has a duty. *Right* requires performance by another; *duty* requires performance by its possessor.

³ It is not intended to consider here either the many difficult problems arising out of *mistake* or the exact operation of the "parol evidence rule."

⁴ It is not uncommon for writers to describe certain rights as "absolute" rights; but any so-called "absolute" right will be found on analysis to consist of a multitude of single rights against a multitude of separate persons, each of whom is under a correlative duty. These rights have been aptly described by Professor W. N. Hohfeld as "multital" rights, as opposed to "unital" rights and "paucital" rights. See *Fundamental Legal Conceptions* (1917) 26 YALE LAW JOURNAL, 710. It is not uncommon to speak of "inherent" rights and "natural" rights,

CONDITIONS AND CONDITIONAL RIGHTS

Society may not command B to perform immediately, however; nor may its command be absolute and unconditional. Thus, if for value received B promised A to pay him \$100 *one year after date*, the law recognizes the existence of a right in A and a duty in B, but will take no steps by way of enforcement until the date of maturity. A duty rests on B, but the performance that it requires is not to take place until the end of the year. B's promise is said to be unconditional, although his duty is in fact conditional upon the passage of a year's time—a condition whose non-occurrence is not conceivable by the human mind and one which is therefore disregarded in describing the promise and the duty.

Suppose, secondly, that B promises to pay the \$100 *after his ship comes in*. Here the promise is a conditional promise, and it is not at all certain that the condition (the coming in of the ship) will occur. It may be argued that until this operative fact called a condition comes into existence there is no right and no duty whatever. It is true that prior to its existence there will be no legal penalty for non-action. But prior to its existence legal relations exist, and they are commonly called conditional rights and conditional duties as opposed to instantly enforceable rights and immediately active duties. No absolute necessity is seen for proposing new descriptive terms; but there is great necessity for understanding the character of the legal relations before and after the actual occurrence of the condition. If the conditioning fact is an *act* of one of the parties he may properly be said to have a *power* to create instant rights and duties by doing the act, and the other party is under a correlative *liability*.⁵ But many conditioning facts are not acts of either party, and neither party has a power. If the condition is the act of a third person, that person has a power and each party to the contract is under a correlative liability.⁶

some even claiming "divine" rights; but these terms are used only by those whose historical perspective is insufficient to enable them to perceive that all such rights are dependent on the prevailing *mores* of society, changing as the *mores* change in the onward course of our evolutionary development. See William G. Sumner (1906) *Folkways*; A. G. Keller (1915) *Societal Evolution*, and especially Professor Keller's article in the present number of the JOURNAL entitled *Law in Evolution*.

⁵ Power and liability are adequate to describe the existing jural relations in this case, but inveterate custom would also justify "conditional right" and "conditional duty." To the writer such a right and such a duty seem to be identical with power and liability respectively. If they are not, then both pairs of relations exist, and there is a power to turn the conditional right and duty into instant ones, and a correlative liability in the other interested party.

⁶ Thus if A agrees to be bound by contract with B subject to the approval of C, A's duty to B is conditional upon the act of C. C has a power and A has a liability. *Thurnell v. Balbirnie* (1837, Exch.) 2 M. & W. 786; *Pym v. Campbell* (1856, K. B.) 6 E. & B. 370.

If the condition is not the act of any person but is instead some other fact of nature, no individual has a power.⁷ In such case we describe the relations between the contracting parties as a conditional right and a conditional duty.⁸

The word "condition" is used in the law of property as well as in the law of contract and it is used with some variation in meaning. In the law of contract it is sometimes used in a very loose sense as synonymous with "term," "provision," or "clause." In such a sense it performs no useful service; instead, it affords one more opportunity for slovenly thinking. In its proper sense the word "*condition*" means some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend. Such a fact may be an act of one of the two contracting parties, an act of a third party, or any other fact of our physical world. It may be a performance that has been promised or a fact as to which there is no promise.

It will be observed that any operative fact may with some propriety be said to be a cause or condition of the legal relations that are consequent thereon. This does not mean that these legal relations will infallibly follow the existence of this fact irrespective of its combination with other antecedent facts; but it does mean that with the same combination of antecedent facts legal relations will infallibly result. An offer is a cause (or condition) of the power in the offeree. An acceptance is a cause (or condition) of contractual rights and duties. Nevertheless in contract law it is not common to speak of these facts as conditions, although such usage is not unknown. The term condition is more properly restricted to facts subsequent to acceptance and prior to discharge.

Express, implied and constructive conditions. A certain fact may operate as a condition, because the parties intended that it should and said so in words.⁹ It is then an express condition. It may operate as

⁷ As where A agrees to be bound to B if a ship comes in, or if the subject matter is not destroyed. *Gray v. Gardner* (1821) 17 Mass. 188; *Taylor v. Caldwell* (1863, Q. B.) 3 B. & S. 826.

⁸ Why should not each of these be described as a mere *liability* to a right or to a duty? The term would not in itself be inappropriate, but such a use of it would not be consistent with the usage that we have already adopted. A legal relation is a relation between human individuals, not between human and divine or between human and impersonal Nature. A liability is the relation of one person to another person when that other possesses the power of changing their legal relations to each other or to third persons by his own voluntary act. Since in the present sort of case no person possesses a power, it seems best not to make use of the term liability. "Conditional duty" serves the purpose well enough and has no secondary signification. In view of the evils involved in the "slippery" words of our present legal terminology, not a single step should be taken toward double significations.

⁹ If they used words that are now interpreted by the court as creating a condi-

a condition because the parties intended that it should, such intention being reasonably inferable from conduct other than words. It is then a condition implied in fact. Lastly, it may operate as a condition because the court believes that the parties would have intended it to operate as such if they had thought about it at all, or because the court believes that by reason of the *mores* of the time justice requires that it should so operate. It may then be described as a condition implied by law, or better as a *constructive condition*.¹⁰

Promise and condition distinguished. Observe that an express or an implied condition is not the same thing as an express or an implied promise. Thus, in *Constable v. Cloberie*¹¹ there was a bilateral contract in which the plaintiff expressly promised to sail with the next favoring wind and the defendant promised to pay a certain sum if the ship made the voyage to Cadiz and returned to the Downs. Sailing with the next wind was a performance that was expressly promised, but it was not a condition of the duty of the defendant to pay.¹² Sailing with the next wind was an operative fact, for it would discharge a duty of the plaintiff; but it had no operative effect upon the defendant's duties or the plaintiff's rights. There was an express condition attached to the defendant's duty to pay, but that was making the voyage to Cadiz and return. The existence of this fact was not promised at all.

tion, but in fact the parties did not intend the words to be thus interpreted, the condition is *express* even though it was *unintended*.

¹⁰ "Supposing a contract to have been duly formed, what is its result? An obligation has been created between the contracting parties, by which rights are conferred upon the one and duties are imposed upon the other, partly stipulated for in the agreement, but partly also implied by law, which, as Bentham observes (*Works*, III, 190), 'has thus in every country supplied the shortsightedness of individuals, by doing for them what they would have done for themselves, if their imagination had anticipated the march of nature.'" Holland, *Jurisp.* (10th ed.) 278. In *Leonard v. Dyer* (1857) 26 Conn. 172, 178, the court said: "And if we were to add stipulations to the contract which the parties themselves did not make, it appears to us that such only should be inferred as the parties themselves would have made, had they foreseen the circumstances that rendered such stipulations important." See also Banks, L. J., in *Groves v. Webb* (1916, C. A.) 114 L. T. Rep. 1082, 1089.

"You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions." Justice O. W. Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 466.

¹¹ (1626) Palmer, 397; s. c. Latch, 12, 49; s. c. Popham, 161.

¹² Of course substantial performance by the plaintiff would be a *constructive* condition. See *infra*, p. 758. Sailing with the first wind might, conceivably, be held to be of the essence, but it was not in fact so held. No doubt sailing within a reasonable time would now be held to be a condition by construction of law.

A promise is always made by the act or acts of one of the parties, such acts being words or other conduct expressing intention; a fact can be made to operate as a condition only by the agreement of both parties or by the construction of the law. The purpose of a promise is the creation of a duty or a disability in the promisor;¹³ the purpose of constituting some fact as a condition is always the postponement of an instant duty (or other specified legal relation). The fulfilment of a promise discharges a duty; the occurrence of a condition creates a duty.¹⁴ The non-fulfilment of a promise is called a breach of contract, and creates in the other party a secondary right to damages; it is the failure to perform that which was required by a previous duty. The non-occurrence of a condition will prevent the existence of a duty in the other party; but it may not create any secondary duty at all, and it *will* not unless someone has promised that it shall occur.

Of course a contract can be so constructed as to create a duty that the fact operative as a condition shall come into existence. If in *Constable v. Cloberie* the plaintiff had promised to make the voyage and return, we should have a case where the future existence of the fact (voyage and return) is expressly promised by the plaintiff and is also a condition precedent to any instant duty of the defendant to pay. The non-performance would then have double operation, on the one hand preventing any instant duty in the defendant to pay freight and on the other creating a secondary duty in the plaintiff to pay damages. Such a condition might be described as a promissory condition.¹⁵

¹³ In some instances the purpose of a promise may be the creation of some other legal relationship than *duty* between the promisor and the promisee. Thus, A may make an offer to B and may promise for a consideration or under seal not to withdraw the offer. This might be (and often has been) regarded as creating a duty in A not to change his mind or not to notify B of such a change, but it should far better be regarded as creating a power in B to be exercised by acceptance and a disability in A to extinguish that power. Thus the purpose of a promise may be the creation of a disability instead of a duty. See *Offer, Option, and Conditional Contract*, *infra*, p. 763. For a more full discussion of Irrevocable Offers see *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169.

¹⁴ The "duty" thus created may be either an instant, unconditional duty requiring immediate performance, or a new conditional duty the condition of which is not the same as that of its predecessor.

¹⁵ See *Home Ins. Co. v. Union Trust Co.* (1917, R. I.) 100 Atl. 1010, holding that a certain proviso created a condition but is not a promise and created no duty. Also *Coykendall v. Blackmer* (1914, N. Y.) 161 App. Div. 11, 146 N. Y. Supp. 631. For cases holding that the particular proviso was promissory and created a duty and was not a mere condition of the other party's duty, see *St. Paul F. & M. I. Co. v. Upton* (1891) 2 N. D. 229, 50 N. W. 702; *Boston S. D. Co. v. Thomas* (1898) 59 Kan. 470, 53 Pac. 472. Some cases indicate a great readiness to find a promise by mere inference or implication. *Dupont Powder Co. v. Schlottman* (1914, C. C. A. 2d) 218 Fed. 353; *Patterson v. Meyerhofer* (1912) 204 N. Y. 96, 97 N. E. 472. Cf. *Clark v. Hovey* (1914) 217 Mass. 485, 105 N. E. 222.

It may be observed that both a promise and a condition are means that are used to bring about certain desired action by another person. For example, an insurance company desires the payment of premiums. One means of securing this desired object would be to obtain a promise by the insured to pay premiums; on failure to pay them an action would lie. In fact, however, insurance policies seldom contain such a promise; the payment of the premiums is secured in a more effective way than that. The insurance company makes its own duty to pay the amount of the policy expressly conditional upon the payment of premiums. Here is no express promise of the insured creating a duty to pay premiums, but there is an express condition precedent to his right to recover on the policy. Payment by the insured is obtained not by holding a lawsuit over him *in terrorem* but by hanging before him a purse of money to be reached only by climbing the ladder of premiums. Before bilateral contracts became enforceable this was the only contractual way for a promisor to secure his desired object. He might offer his promise and specify the desired performance as the one mode of acceptance; or he might deliver his own sealed promise, making it expressly conditional upon the desired performance. In either case the promisee would have no legal right against the promisor, and could not get the purse of money, unless he first performed as desired. But as soon as bilateral contracts (mutual promises creating mutual duties) became enforceable, the courts observed that a promisor now had a new remedy and a new means of securing his desired object. Previously, in getting a return promise he got nothing; now he got a legally enforceable right. Hence, it did not appear unjust to declare mutual promises to be independent, and to compel a defendant to perform as he had agreed even though the plaintiff had failed to perform his part; the defendant had a like remedy in his turn against the plaintiff.¹⁶ It gradually became evident, however, that the contracting parties usually made no conscious choice of remedies, choosing the remedy on a promise rather than the advantage given by a condition. Often the remedy on a promise is very inadequate, and it is not surprising that the courts reverted to the earlier form. At first they seized upon such words as "for" and "in consideration of," construing these to create express conditions.¹⁷ Later, by reading wholly between the lines, they found a supposed intention of the parties that the defendant's promise should be conditional, or in the absence of any intention whatever they frankly constructed a condition in order to do justice according to the *mores* of the time. Thus grew up the rules of law concerning implied and constructive conditions.

¹⁶ If there were no such return remedy the court would willingly *imply* a condition. *Pordage v. Cole* (1669, K. B.) 1 Wms. Saund. 319 (*semble*).

¹⁷ See *Thorpe v. Thorpe* (1701, K. B.) 12 Mod. 455; also Fineux, C. J., in *Y. B. 15 Hen. VII. f. 10 b*, pl. 7.

Conditions precedent, concurrent, and subsequent. All conditions are precedent to the legal relations that they operate to create, and they are always subsequent to the legal relations and other facts that preceded them. The terms precedent and subsequent express a relation in *time* between two facts, one of which is the legal relation itself; and before using either one of them it is necessary to determine just what two facts are being considered. In the case of *Constable v. Cloberie* above stated, making the voyage to Cadiz and return was a fact that was subsequent to the formation of the contract, subsequent to acceptance of the offer; but it was precedent to the existence of any instant duty in the defendant to pay, precedent also to any secondary right in the plaintiff to damages for non-payment.

A *condition precedent* is an operative fact that must exist prior to the existence of some legal relation in which we are interested. The particular relation most commonly in mind when this term is used is either the instant and unconditional duty of performance by a promisor or the secondary duty to pay damages for a breach of such duty of performance.¹⁸

A *condition subsequent* is an operative fact that causes the termination of some previous legal relation in which we are interested.¹⁹ The term is used with reference to both primary contractual duties and secondary duties.²⁰

¹⁸ The following are illustrations. I promise to pay such an amount as X may determine: *Thurnell v. Balbirnie* (1837, Ex.) 2 M. & W. 786; *Old Colony Ry. v. Brockton Ry.* (1914) 218 Mass. 84, 105 N. E. 866; *Scott v. Avery* (1856) 5 H. L. Cas. 811. I promise to pay as soon as I am able: *Work v. Beach* (1891, Sup. Ct.) 13 N. Y. Supp. 678. See also Ulpian, Dig. 2, 14, 49. I promise to pay after architect X has certified that the work is properly done: *Clarke v. Watson* (1865) 18 C. B. N. S. 278; *Granger Co. v. Brown-Ketcham Iron Works* (1912) 204 N. Y. 218, 97 N. E. 523. Cf. *Nolan v. Whitney* (1882) 88 N. Y. 648.

In these cases the determination by X, the financial ability, and the architect's certificate are facts that operate as conditions precedent to the legal duty to pay.

¹⁹ Examples of conditions subsequent to the secondary obligation and terminating it are to be found in *Semmes v. Hartford Ins. Co.* (1871, U. S.) 13 Wall. 158; *Chambers v. Atlas Ins. Co.* (1883) 51 Conn. 17; *Read v. Insurance Co.* (1897) 103 Ia. 307, 72 N. W. 665; *Ward v. Warren* (1903) 44 Or. 102, 74 Pac. 482; *Smart v. Hyde* (1841, Ex.) 8 M. & W. 723. For instances of a condition subsequent to the primary obligation, its non-occurrence being a condition precedent to the secondary obligation, see *Gray v. Gardner* (1821) 17 Mass. 188; *Moody v. Ins. Co.* (1894) 52 Oh. St. 12, 38 N. E. 1011.

²⁰ *Conditions concurrent.* There are many bilateral contracts creating mutual duties requiring concurrent performances by the two parties. In such cases the tendency has long been to hold that a tender of performance by one party is a condition precedent to the instant duty of the other. Inasmuch as the performances are to be simultaneous it has led to their being called concurrent conditions. It seems better, however, to say that there are concurrent conditional duties, the instant duty of each party being subject to a condition precedent (tender by the other party). Illustrative cases are as follows:

Payment and conveyance in sales of land: *Sherman v. Leveret* (1790, Conn.)

The practice is almost universal of using these terms to describe the legal operation of some fact without mentioning or even clearly considering the particular legal relation to which the fact is being related in time. The result is most distressing; it leaves the reader confused and doubtful and it is a cause of conflict in decision, uncertainty of law, and actual injustice. In one case a fact will be called a condition precedent and in another case the same fact (or its non-existence) will be called a condition subsequent, because in the first case it is being subconsciously related to the legal relations that follow it and in the other case to the legal relations that preceded it.²¹

Burden of alleging and proving operative facts. It has been supposed that by the use of these terms precedent and subsequent it can be determined which party bears the burden of proof and the burden of alleging the existence of the fact. This will now be considered.

The problem of pleading is not at all identical with the problem of proof by means of evidence, but for our present purpose they may be discussed together. The plaintiff must state in his declaration all facts necessary to make out a "cause of action," and if his statements are traversed he must later prove them by a preponderance of evidence. What then is a "cause of action" in contract cases? In assumpsit for damages it includes the formation of a valid contract and a breach thereof by the defendant, a primary obligation and a secondary obligation. The primary obligation consists of those legal relations arising at the time of acceptance; the secondary obligation consists of those arising at the time of breach. There can be no breach until an active primary duty exists. It would seem, therefore, that the plaintiff would have to allege and prove every fact that is a condition precedent to the existence of this primary duty and of the secondary duty arising from its breach. Some of these facts are precedent to the primary duty; others are subsequent thereto but are precedent to the secondary duty.²²

1 Root, 169; *Beecher v. Conratt* (1855) 13 N. Y. 108; *Goodisson v. Nunn* (1792, K. B.) 4 T. R. 761; *Green v. Reynolds* (1807, N. Y.) 2 Johns. 206.

Payment and delivery in sales of goods: *Morton v. Lamb* (1797, K. B.) 7 T. R. 125; *Brown v. Rushton* (1916) 223 Mass. 80, 111 N. E. 884; *Diem v. Koblitz* (1892) 49 Ohio St. 41, 29 N. E. 1124.

²¹ That the confusion between conditions precedent and conditions subsequent is both ancient and respectable, in property law as well as in contract law, witness 2 Coke's Inst. ch. 27, 11: "Many are of opinion against Littleton in this case . . . and that here Littleton of a condition precedent doth make it subsequent." Coke states the arguments *pro* and *con.* and then adds: "*Benigne lector, utere tuo iudicio, nihil enim impedio.*"

²² The burden of proving a fact is always thrown upon the plaintiff whenever the court declares that fact to be a condition precedent. Also the complaint is demurrable if the existence of the fact constituting such a condition is not alleged. *Worsley v. Wood* (1796, K. B.) 6 T. R. 710; *Newton Rubber Works v. Graham* (1898) 171 Mass. 352, 50 N. E. 547; *Colt v. Miller* (1852, Mass.) 10

But a "cause of action" must exist at the time of bringing suit. It is not enough that a breach occurred, giving rise to a secondary duty to pay damages. That secondary duty must have continued existence. After the birth of such a secondary duty many new facts may occur prior to bringing suit that will destroy it. These operative facts are subsequent to the birth of the secondary duty but their non-existence is a condition precedent to the plaintiff's right to a judgment, although not precedent to his right to payment as promised. It might seem therefore that the plaintiff must affirmatively allege every fact necessary to the existence of the primary duty, to the birth of the secondary duty, and to the continued existence of the secondary duty down to the time of suit,²³ and bear the burden of proving his allegations. Such, however, is not the case as to many of these operative facts. No primary legal duty will exist if the parties made the contract with an unlawful purpose, and yet the plaintiff is not required either to allege or to prove the absence of such a purpose. The defendant is no longer under his primary duty if he has repudiated the contract for the fraud of the plaintiff, and yet the plaintiff need not allege the absence of fraud and of disaffirmance. There are numerous ways in which a primary duty can be discharged before breach and in which a secondary duty can be discharged afterwards, but the burden of allegation and proof is often thrown on the defendant. Such facts are described as affirmative defenses.²⁴

Cush. 49. See Ames, *Cases on Pleadings*, 307, citing many cases. Frequently the ruling as to the burden of proof will be decisive of the whole case because of the lack of evidence. Thus, where an insurance policy provided for payment to the wife of the insured, if living, otherwise to the estate of the insured, and both husband and wife went down with the *Lusitania*, the administrator of the wife failed to recover because he could not prove that the husband died first. *McGowin v. Menken* (1918, N. Y.) 119 N. E. 877. It should be observed that the husband's *not* dying first is equally a condition precedent to the right of *his* administrator. This would become evident in an action by such administrator against the insurance company.

²³ When a particular state of affairs is once shown to exist, the law will assume its continued existence and throws upon the party alleging a new operative fact changing that state of affairs the burden of proving the new fact. So the legal relations composing a primary obligation will be assumed to continue, as will also those composing a secondary obligation arising from breach of contract. Since a "cause of action" consists of a secondary as well as a primary obligation, one might suppose the plaintiff would have the burden of proving all the facts necessary to both. It appears, however, that this is not the case.

²⁴ Whenever a court describes a fact as a condition *precedent* it invariably throws the burden of proof upon the plaintiff. When the court wishes to throw the burden of proving the fact upon the defendant it will frequently bring this about by describing the fact as a condition *subsequent*. Thus, it is often provided in insurance policies that the contract is to be "void" in a certain event that may or may not happen; the burden of proving the occurrence of the event

Thus it is evident, in spite of very general assumptions to the contrary, that the burden of allegation and the burden of proof cannot be determined by the test of such descriptive adjectives as precedent and subsequent. It is no doubt true that the law on this subject needs entire reconstruction and restatement, that there is no existing test capable of logical definition, and that the rules are largely arbitrary as well as conflicting. Such rules as now exist will frequently be found to be based on false logic or on some ill-defined notion of public policy.²⁵

Conditions in unilateral contracts. A unilateral contract is one where only one of the parties assumes a contractual duty and only the other acquires any contractual right; as, for example, where A sells and delivers a chattel to B on credit. In such a case full performance by A is a condition precedent to the existence of any primary duty in B.²⁶ There may, however, be further conditions, both intentional (i. e., express and implied in fact) and constructive, precedent to B's instant and unconditional duty to pay the price or to his secondary duty to pay damages for breach. B's promise might be expressly conditional, e. g., B is to pay "if his ship comes in."²⁷ If B promised to pay in his own personal labor, his duty would be constructively conditional on his continued life and health.

Conditions in bilateral contracts. A bilateral contract is made by mutual promises and is one in which each party assumes a duty of performance. Each duty may require either instant performance or future performance, and each may be either conditional or unconditional. The condition of either party's duty may be performance by the other party or an act of a third party or some future event or information as to a past event. If the duty of A is conditional upon the prior performance of B in accordance with his promise, or upon the tender of such performance by B, A's promise is said to be *dependent*. If it is not so conditional, his promise is said to be *independent*.²⁸

is nearly always put upon the defendant company. The occurrence of the event is indeed subsequent to the primary obligation, but its non-occurrence is a condition precedent to any *active* duty of the defendant to pay, either primary or secondary. See *Benanti v. Delaware Ins. Co.* (1912) 86 Conn. 15, 84 Atl. 109; *Marcovitch v. Liverpool V. F. Soc.* (1912, C. A.) 28 Times L. R. 188; *Moody v. Ins. Co.* (1894) 52 Oh. St. 12, 38 N. E. 1011; *Murray v. New York Life Ins. Co.* (1881) 85 N. Y. 236; *Bowers v. Great Eastern Cas. Co.* (1918, Pa.) 103 Atl. 536. See further Ames, *Cases on Pleading*, 302-306, citing more than 100 cases.

²⁵ For a very excellent discussion of principles involved, see the dissenting opinion of Chief Justice Doe in *Kendall v. Brownson* (1866) 47 N. H. 186, 196.

²⁶ Not necessarily precedent, however, to an irrevocable power of acceptance. See (1917) 26 YALE LAW JOURNAL, 169, *Offer and Acceptance and Some of the Resulting Legal Relations*.

²⁷ *Martindale v. Fisher* (1745, K. B.) 1 Wilson, 88.

²⁸ Where B sells goods to A, delivery to be made May 1, payment promised

If the performances of the two parties are required to be concurrent in time and neither party can be charged with a breach until after a tender of performance by the other, both promises are dependent and the conditions are said to be concurrent.²⁹ That a promise is dependent is merely one way of saying that the duty it creates is a conditional duty. The term has been used chiefly with respect to mutual promises not made conditional in express terms, the condition being implied or constructive.

Effect of non-occurrence of a condition. The non-occurrence of the operative fact described as a condition must be sharply distinguished from the non-performance of a promise, although the performance that is promised may also be operative as a condition. So long as the operative fact remains non-existent, the expected legal relation (e. g., the primary duty of instant performance or the secondary duty to pay damages) does not exist. If, however, the time for the occurrence of the condition has not yet expired, the previous legal relations remain unaffected. Suppose that A has made a conditional promise to convey Blackacre to B, the condition being that B shall tender \$1000 to A within one year. A tender of the money at any time during the year will turn A's conditional duty into an instant duty; during the entire year there remains the possibility that the operative fact will come into existence. At the expiration of the year, however, no such possibility remains, and A's previous conditional duty (or liability)³⁰ is now terminated. Suppose further that the consideration for A's conditional promise to convey was a return promise of B to pay \$1000 within one year independently of conveyance by A. Now the tender of payment is an act that B's duty requires, as well as a condition precedent to A's instant duty to convey. Failure to tender within the year is now a breach of duty as well as the non-occurrence of a condition; it creates in B a secondary duty to pay damages in addition to terminating A's conditional duty to convey.³¹

by A on June 1, the promise of B to deliver the goods is independent and the promise of A is dependent. In the absence of delivery by B, A is under no duty to pay. *Norrington v. Wright* (1885) 115 U. S. 118, 6 Sup. Ct. 12. So if B agrees to work for one month for A for \$100, B's promise to work is independent and A's promise to pay is dependent. It does not follow from this that B's duty is entirely unconditional in either case; for in the first he is privileged not to deliver on May 1 in case A is insolvent, and in the second he is privileged not to work in case of illness. *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289; *Spalding v. Rosa* (1877) 71 N. Y. 40.

²⁹ *Morton v. Lamb* (1797, K. B.) 7 T. R. 125; *Beecher v. Conradt* (1855) 13 N. Y. 108. See note 20, *supra*.

³⁰ See note 5, *supra*.

³¹ In this case, however, the contract should not be said to be discharged as a whole, because A still has his right to full payment—a right specifically enforceable in equity.

Where the fact that operates as a condition was not agreed upon as such by the parties, either expressly or impliedly, but is a condition by construction of law, the non-existence of the operative fact called a condition has sometimes been described as an "equitable defense." At the very best, this term "defense" is analytically misleading. In the absence of the operative fact there never was a cause of action. The question here is not as to which party shall prove the facts, but as to the operative effect of the facts after being proved. The word "equitable" is equally undesirable. It renders accurate historical (not analytical) service in one instance only, and that is in a case where the fact in question was held to operate as a condition in the court of chancery only, and not in the courts of common law, of admiralty, of the merchants, of the manors, of the cities, and of the church. In cases of this sort the will of the chancellor eventually became paramount and his procedure became effective so as practically to nullify the rules of the other courts. Thereafter the non-existence of the fact that may be described as an "equitable" condition meant that the contemplated legal relation did not exist, that the plaintiff had no right and that the defendant was under no duty. In the present state of our legal system it is seldom necessary or desirable to make use of the word "equitable" to describe the jural effect of a fact that operates as a constructive condition. Such a fact is nearly always a constructive condition in all courts alike, and its existence or non-existence has the same operative jural effect in all courts alike. There is conflict, indeed, in determining whether or not a certain fact should operate as a condition; but, generally speaking, this is no longer a conflict between the King's Bench and the Chancery, it is a conflict between Judge A and Judge B.

Rules for determining what facts operate as conditions. Everyone knows that the "construction" of a contract is one of the most difficult problems known to the law. What is the operative legal effect of facts occurring subsequently to acceptance of an offer? In answering this question in individual cases jurists have constructed various rules, some of which are of service but none of which can safely be followed in all cases. Too often they are expressed in terms of mere verbal interpretation, the general dogma being avowed that "the law cannot make contracts for the parties." They are nearly always expressed in terms of logical exactitude, nursing that "illusion of certainty" to which Mr. Justice Oliver Wendell Holmes has frequently referred. Candor compels the admission that logic is not the decisive factor and that certainty and uniformity do not exist even within the limits of a single jurisdiction.³²

³² The reply of the defendant in *Norrington v. Wright* (1885) 115 U. S. 118, 6 Sup. Ct. 12, was justified by the state of the law. "You ask us to determine

Whether or not some fact is expressly required as a condition is, indeed, to be determined in accordance with rules of verbal interpretation; but how easily and effectively can we read between the lines when the express requirement seems to operate harshly and unfairly! We may calmly disregard it or we may openly nullify its operation on the ground that new facts, unforeseen by the parties, have occurred. No doubt, too, this is in accordance with our long established *mores*. The approval of the community is not obtained by insisting on the letter of the bond. Thus, where the promise was to pay a price after a named architect had given his certificate and not otherwise, the promisor has not infrequently been held in duty bound to pay even though no certificate has been given.³³ Likewise a contract expressly describing some fact as a condition subsequent, providing that an existing right of action shall cease if the claimant fails to bring suit within a twelvemonth, has been openly set aside because the bringing of the suit was made very difficult by the breaking out of war.³⁴ There are, to be sure, variations in the readiness with which courts set aside express terms of this sort and we are sometimes reminded that the paramount public policy is that we must not lightly interfere with freedom of contract.³⁵

If, as appears, courts very often feel free to nullify express conditions and to deprive facts of the legal effect that the parties expressly stated they should have, we need not be at all surprised to find that they act much more freely in giving a legal effect to facts that the parties said nothing about, that is, in creating constructive conditions. Here, as elsewhere, judicial precedent plays an important part; but circumstances alter cases, and the circumstances vary so widely and so frequently that general rules become pitfalls. It is no doubt going too far, however, to suggest that the only unvarying rule is that we

whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule, and its uncertainty of application."

³³ *Nolan v. Whitney* (1882) 88 N. Y. 648. This case has been disapproved in Massachusetts. *Audette v. L'Union St. Joseph* (1901) 178 Mass. 113, 59 N. E. 668. In England it would not be followed, but the condition is nullified if the certificate is withheld by collusion. *Batterbury v. Vyse* (1863, Ex.) 2 H. & C. 42.

³⁴ *Semmes v. Hartford Ins. Co.* (1871, U. S.) 13 Wall. 158. See also *Read v. Insurance Co.* (1897) 103 Ia. 307, 72 N. W. 665.

³⁵ See *Tullis v. Jackson* [1892] 3 Ch. 441, quoting Sir George Jessel. For a case giving full effect to an express condition even though it caused an extraordinary forfeiture and in spite of the fact that the plaintiff's non-performance was due in part to erroneous action of the Court of Appeals itself, see *Evans v. Supreme Council* (1918) 223 N. Y. 497, 126 N. E. 93.

must act as our neighbors believe that a just and reasonable man would act under the circumstances.³⁶

Waiver of conditions. It is well established that a condition precedent to a contract duty of immediate performance may be waived by a voluntary act of the party who is undertaking the duty. The same cannot be said with assurance of other burdensome legal relations. Such a condition certainly cannot be waived or dispensed with by the opposite party to the legal relation, who will benefit by the waiver—the expectant holder of the right, power, privilege, or immunity.

The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak, it covers a multitude of sins.³⁷ In the present instance the word is used to describe almost any voluntary act of a contracting party which operates to bring his contractual duty into existence even in the absence of some fact that previously was a condition precedent. It may consist of a mere act of assent to the new legal relation; and although its legal operation is rendered more certain in case the other party gives a new consideration or acts in reliance upon the waiver, neither consideration nor change of position seems to be necessary. The new act of assent operates as a substitute for that which previously was a condition, and it so operates in the case of both express and constructive conditions.³⁸

The term waiver is also used to refer to conduct that now makes it inequitable to insist upon the previous condition, even though the party acting did not in fact assent to a waiver.³⁹ In these cases, however,

³⁶ Since the present article is intended to deal with conditions chiefly from the standpoint of legal analysis, no attempt is made to state the numerous rules for determining the existence of implied or constructive conditions. There are many such rules, doubtful in form of statement and more doubtful in application, with reference to conditions in instalment contracts, employment contracts, aleatory contracts, and the like.

³⁷ See Ewart (1917) *Waiver Distributed*.

³⁸ Where time is of the essence, the condition can be waived by granting an extension, and the one so waiving cannot thereafter enforce a provision for liquidated damages for delay. *Maryland Steel Co. v. United States* (1915) 235 U. S. 451, 35 Sup. Ct. 190.

"He may waive the condition, and accept the title though defective. If he does, the seller may not refuse to convey because the buyer could not have been compelled to waive. . . . We think the waiver to be effective did not call for the seller's approval. . . . From the moment that the waiver was announced, the remedy was mutual." *Catholic F. M. Society v. Ousanni* (1915) 215 N. Y. 1, 109 N. E. 80.

See further *Korman v. Trainer* (1917) 258 Pa. 362, 101 Atl. 1051; *Cape May R. E. Co. v. Henderson* (1911) 231 Pa. 82, 79 Atl. 982.

Where the plaintiff sues on an express contract and avers full performance, it is a variance to prove substantial performance and a waiver. *Allen v. Burns* (1909) 201 Mass. 74, 87 N. E. 194.

³⁹ The approval of an architect as a condition may be waived by accepting and using the building. *Pennsylvania Rubber Co. v. Detroit Shipbuilding Co.* (1915)

there must be some change of position by the other party in reliance upon the supposed waiver. The conduct and its results operate much after the manner of an estoppel.

It will be observed that the doctrine of waiver is practically a nullification of the doctrine of consideration in certain cases. Where there is action in reliance upon the waiver the case falls easily within the group of cases holding that certain kinds of subsequent reliance upon a promise are a sufficient consideration;⁴⁰ but where the waiver consists of a mere voluntary assent there is no consideration of any sort, and yet a new duty is thereby created where no such duty previously existed.⁴¹ This doctrine applies, however, only to conditions in the sense heretofore explained, as including operative facts subsequent to acceptance. One cannot create a primary obligation by "waiver"; for that, there must be a specialty or a consideration. No doubt in most cases of waiver, it will be found that there has been a change of position by the other party in reliance upon the act of waiver.

Impossible conditions. We must first distinguish the question of possibility of performance of a thing promised, as a condition precedent to the duty of the promisor. Where such performance is legally or physically impossible at the time the promise is made, no duty arises, not even a liability to a duty. In such case the acceptance is an inoperative fact and we should say that no contract is formed. Where the impossibility arises subsequently to acceptance, the existing conditional duty is terminated. The absence of such impossibility is a condition precedent to the duty of the promisor to perform as promised and to his secondary duty to pay damages for breach.⁴²

In the present paragraph we are dealing with cases where performance of the acts promised by the defendant is entirely possible, but

186 Mich. 305, 152 N. W. 1071. Also by making a number of payments without insisting on the certificate. *McKenna v. Vernon* (1917) 258 Pa. 18, 101 Atl. 919; *Mayer Const. Co. v. Amer. Sterilizer Co.* (1917) 258 Pa. 217, 101 Atl. 1002. Also by accepting a short delivery of goods. *Craig v. Lane* (1912) 212 Mass. 195, 98 N. E. 685.

⁴⁰ See Anson on *Contracts* (Corbin's ed. 1919) sec. 127 note.

⁴¹ Where proof of loss within a fixed time is made a condition by an insurance policy, the condition may be waived even after the expiration of the period fixed. *Johnson v. Bankers, etc. Co.* (1915) 129 Minn. 18, 151 N. W. 413; *Dezell v. Fidelity, etc. Co.* (1903) 176 Mo. 253, 75 S. W. 1102; *Kiernan v. Dutchess, etc. Co.* (1896) 150 N. Y. 190, 44 N. E. 698; *Lebanon etc. Co. v. Erb* (1886) 112 Pa. 149, 4 Atl. 8; *Owen v. Farmers, etc. Co.* (1869, N. Y.) 57 Barb. 518.

The duty of an indorser on a negotiable instrument is conditional upon demand and notice; but even after failure of this condition, a voluntary waiver will bind the indorser to pay. *Rindge v. Kimball* (1878) 124 Mass. 209.

⁴² No further discussion of the effect of this sort of impossibility will be attempted in the present article. See (1913) 22 YALE LAW JOURNAL, 519 ff. *Discharge of Contracts*, and Anson on *Contracts* (Corbin's ed. 1919) secs. 373-380.

where there is a condition precedent to his duty of performance the occurrence of which is legally or physically impossible. In this case, also, the impossibility may exist at the time of acceptance or may arise subsequently. Suppose the defendant has promised to pay \$100, but only on condition that X shall reach the moon. Here the act to be performed by the defendant is quite possible but the act to be performed by X is not. Here no duty or liability is created, and the defendant's promise would no doubt be held to be inoperative as a consideration for a return promise.⁴³ Suppose the defendant has promised to pay \$100, but the promise is to be void if X shall reach the moon. Here the reaching of the moon is a condition subsequent, and since it cannot be fulfilled the promise creates an unconditional duty to pay.⁴⁴ In this case the not-reaching of the moon is in fact a condition precedent to the active duty of payment, but since the existence of this fact is certain it may be disregarded.

A like result is obtained where the existence of the fact that operates as a condition becomes impossible after acceptance of the offer but before the time for performance, except that in this case the defendant's promise is a sufficient consideration for the return promise and there was a valid contract. If B promises to paint a house and A promises to pay \$100 after the house is painted, there is a valid contract; but if the house is totally destroyed before painting, A is under no contract duty to pay \$100. In such a case it is possible for the court to create a non-contract debt to pay for value received, but this is quite a different matter.⁴⁵ Suppose B has built a house in return for A's promise to pay after architect X shall certify his approval, and X dies or becomes insane before he can inspect the house. It is altogether probable that a court would here disregard the express term creating a condition and compel A to pay the agreed sum on a reasonable showing that the house is properly built.⁴⁶ In so holding, the

⁴³ Yet the court said in *Worsley v. Wood* (1796, K. B.) 6 T. R. 710, "If there be a condition precedent to do an impossible thing, the obligation becomes single." By this no doubt the court meant that the obligation becomes *unconditional*. Such appears to be the continental rule in cases of conditional donations by will. French Civil Code, sec. 900; II Inst. Justinian, 14. But in the case of contracts with impossible conditions precedent, the rule is generally stated as in the text above. French Civ. Code, sec. 1172; Ulpian, Dig. 45, 1, 7; Gaius, III Inst. 98; 3 Savigny, *System*, sec. 124.

⁴⁴ See Rolle Abr. 420 (E); Co. Litt. 206. The same result obtains where the occurrence of a condition subsequent becomes impossible after the formation of the contract. Such a condition subsequent has been flatly disregarded in a case where its occurrence was made *inevitable* (not impossible) by act of the law. *Semmes v. Hartford Ins. Co.* (1871, U. S.) 13 Wall. 158. (The condition subsequent to the duty of instant payment was forbearance to sue for twelve months.)

⁴⁵ See *Butterfield v. Byron* (1891) 153 Mass. 517, 27 N. E. 667.

⁴⁶ See *Reed v. Loyal Protective Association* (1908) 154 Mich. 161, 117 N. W.

court is either determining that the certificate was not in fact a condition or else it is creating a duty to which the parties did not in fact assent.

Prevention by the defendant of the existence of the fact that is a condition. Where the non-occurrence of a condition precedent to the defendant's duty has been caused by the act of the defendant himself, that act will gravely affect the existing legal relations.

In many cases it will be held to be a "waiver" of the condition.⁴⁷ Thus in contracts of employment the doing of the work is usually a condition precedent to the duty of the employer to pay, but if the workman is wrongfully discharged he can maintain an action for damages without showing that the work was done.⁴⁸ In such a case, however, the workman is not now generally held to be entitled to maintain an action of debt for the full contract price. The actual rendition of the service is still a condition precedent to such a right, because it is not regarded as just for the plaintiff to have both his time and his money, even though the defendant is in the wrong.⁴⁹

In other cases the act of the defendant has been held to be a breach of contract on the theory that he has promised, expressly or impliedly, not to prevent the occurrence of the condition.⁵⁰ In some of these cases the inference of a promise seems far-fetched.

A suggestion has been thrown out that the act of the defendant is

600; *London and N. E. Co. v. Schlesinger* [1916] 1 K. B. 20; *Mayer Const. Co. v. Amer. Sterilizer Co.* (1917) 258 Pa. 217, 101 Atl. 1002; *Deyo v. Hammond* (1894) 102 Mich. 122, 60 N. W. 455; *Trippe v. Provident Fund Society* (1893) 140 N. Y. 23, 35 N. E. 316; *Comstock v. Fraternal Accident Ass'n.* (1903) 116 Wis. 382, 93 N. W. 22; *Leiston Gas Co. v. Leiston, etc. Council* [1916] 2 K. B. 428. Cf. *Whiteside v. North American Acc. Ins. Co.* (1911) 200 N. Y. 320, 93 N. E. 948.

⁴⁷ *Young v. Hunter* (1852) 6 N. Y. 203; *Ripley v. McClure* (1849) 4 Exch. 345; *Mansfield v. Hodgdon* (1888) 147 Mass. 304, 17 N. E. 544; *Louisville & N. R. v. Goodnight* (1874, Ky.) 10 Bush, 552; *United States v. United Eng. & Con. Co.* (1914) 234 U. S. 236, 34 Sup. Ct. 843; *Pneumatic Signal Co. v. Texas & P. R. R.* (1910) 200 N. Y. 125, 93 N. E. 471; *Batterbury v. Vyse* (1863, Ex.) 2 H. & C. 42; French Civil Code, sec. 1178; Ulpian, Dig. 50, 17, 161.

⁴⁸ *Barton v. Gray* (1885) 57 Mich. 622, 24 N. W. 638; *McCargo v. Jergens* (1912) 206 N. Y. 363, 372, 99 N. E. 838; *Tucker v. Boston* (1916) 223 Mass. 478, 112 N. E. 90.

⁴⁹ *Clark v. Marsiglia* (1845, N. Y. Sup. Ct.) 1 Denio, 317.

⁵⁰ Where the plaintiff had agreed to buy certain land and then to convey it to the defendant who promised to pay a price, and later the defendant bought the land himself, the plaintiff was held entitled to damages. *Patterson v. Meyerhofer* (1912) 204 N. Y. 96, 97 N. E. 472. To similar effect are *Dupont Powder Co. v. Schlottman* (1914, C. C. A. 2d) 218 Fed. 353; *Simon v. Eigen* (1915) 213 N. Y. 589, 107 N. E. 1066; *Brucker v. Manistee R. R.* (1911) 166 Mich. 330, 130 N. W. 822; *Gay v. Blanchard* (1880) 32 La. Ann. 497, 504; *U. S. v. Behan* (1884) 110 U. S. 338, 4 Sup. Ct. 81. But see *contra Clark v. Hovey* (1914) 217 Mass. 485, 105 N. E. 222.

a tort.⁵¹ This could be justified on the theory that the plaintiff had a valuable power to create rights by performing the act that operates as a condition and that the act of the defendant is a wrongful destruction of this power. The defendant's act will of course be tortious if it amounts to the conversion or destruction of some physical property of the plaintiff.

If the defendant has already received benefits from a part-performance by the plaintiff, he should certainly be bound to pay the reasonable value thereof, as a quasi-contract or non-contract debt.⁵² This is correct beyond question if the prevention by the defendant was not a privileged act, and it seems probably correct even if the defendant's act was privileged.

In some cases the prevention by the defendant has been held to be privileged.⁵³ In such case the defendant is liable neither for breach of contract nor in tort, and probably the condition precedent to his own contractual duty should not be regarded as waived.

The problem discussed above is to be distinguished from prevention by the plaintiff of the performance *promised* by the defendant. In case of such prevention the defendant is not guilty of a breach.⁵⁴

The doctrine of substantial performance. There has arisen in the United States an indefinite doctrine sometimes referred to as that of substantial performance. It is a doctrine that deals not with performance of a duty as a discharge thereof but with performance by the plaintiff as a condition precedent to the active duty of performance by the defendant. Where a contractor is sued for non-performance he cannot wholly avoid paying damages by showing that he substantially performed or came near performing or gave something equally as good; but when he brings suit as a plaintiff he can frequently win even though he has not performed his own part in every minute detail.

Suppose that the plaintiff has *substantially* performed as required by his own promise but not completely in every respect;—the court must

⁵¹ *MacPherson v. Mackay* (1918, N. J. Sup. Ct.) 103 Atl. 36. The case might perhaps be brought within the doctrine of *Lumley v. Gye* (1853, Q. B.) 2 El. & Bl. 216.

⁵² *Hoyt v. Pomeroy* (1913) 87 Conn. 41, 86 Atl. 755.

⁵³ *Clark v. Hovey*, *supra*. A case may be supposed where the plaintiff agreed to furnish certain goods, delivery being a condition precedent to his right to payment, and where he has been prevented from fulfilling this condition by the lawful act of the defendant in buying up the entire market supply (for actual use and with no intent to corner the market). The defendant's act *might* be held to discharge the plaintiff's duty to deliver, but it would not be the breach of any duty owed by the defendant to the plaintiff.

⁵⁴ See *United States v. Peck* (1880) 102 U. S. 64; *Porto Rico v. Title Guar. & Surety Co.* (1913) 227 U. S. 382, 389, 33 Sup. Ct. 362; 2 Coke, Inst. ch. 27, 19; Rolle Abr. 453 (N) 3, 4. Cf. *Blandford v. Andrews* (1599) Cro. Eliz. 694.

now determine whether or not some act unperformed was a condition precedent to the defendant's duty. It is never correct to say that substantial performance of a condition is sufficient; but it is frequently correct to say that absolutely exact and complete performance by the plaintiff as promised is not a condition precedent to the duty of the defendant. If substantial performance by the plaintiff was sufficient to charge the defendant, then such substantial performance was the only condition and the requirement has been exactly fulfilled. The question of the plaintiff's duty to pay damages for his own partial non-performance is a different question altogether. Substantial performance of A's promise may be sufficient to enable him to maintain action against B, and yet at the same time be insufficient to prevent B from having an action against A.

Where the defendant has clearly stipulated that a certain performance by the plaintiff must precede his own duty to pay, the specified performance is a condition precedent. The court can, it is true, accept "something equally as good," making it operate as the only condition, and then compel the defendant to pay.⁵⁵ This is what the irreverent might describe as making a contract for the parties.⁵⁶ If the defendant has not stipulated that the performance by the plaintiff shall be a condition precedent to his own active duty, but has merely caused the plaintiff to make a promise and thus undertake a duty on his own part, then the court need not require any performance at all by the plaintiff as a condition precedent to the defendant's duty, and if it requires any performance at all as a condition it is fair and just to require only substantial performance as such condition.

Our conclusions may be stated as follows:

(1) Every performance that constitutes a condition must be fulfilled exactly.

(2) What is a condition is a question of interpretation and construction (in the broadest sense).

(3) Substantial performance of the acts promised by the plaintiff may be made the only condition of the defendant's duty, either by reasonable inference of fact or by pure construction of law. If this much performance has taken place, the plaintiff can maintain debt (or its equivalent) for the agreed price. In such case it is proper for him to allege full performance, for this means performance of all things necessary to create the defendant's duty to pay, not performance of a sort that fully discharges his own duty. Non-substantial variations from the exact terms of the contract, even though they are con-

⁵⁵ See *Nolan v. Whitney* (1882) 88 N. Y. 648.

⁵⁶ The rule in *Nolan v. Whitney*, *supra*, is expressly disapproved in *Audette v. L'Union St. Joseph* (1901) 178 Mass. 113, 59 N. E. 668. In *Crouch v. Gutmann* (1892) 134 N. Y. 45, 31 N. E. 268, it is said in the dissenting opinion that the court has gone too far in making new contracts for the parties.

scious on the part of the plaintiff, will not prevent his recovery on the express contract; and no waiver on the part of the defendant is required.⁵⁷ For such non-substantial breaches the defendant has a counterclaim for damages and may thus reduce the amount to be recovered by the plaintiff; but the defendant is not privileged not to perform as he promised.⁵⁸ In like manner equity frequently decrees specific performance by the defendant, allowing him compensation for slight deficiencies.⁵⁹

(4) Where substantial performance by the plaintiff is a condition precedent to the duty of immediate performance by the defendant, and this condition has not occurred, the plaintiff can maintain no suit for the agreed price unless there is a waiver of the condition by the defendant.⁶⁰ If there has been a true waiver by the defendant, his duty of immediate performance exists and the plaintiff can maintain an action on the express contract for the agreed price or its equivalent. In such case, however, the plaintiff should not allege full performance of conditions; if he does his proof will show a variance. The operative facts are the agreement, the incomplete performance, and the waiver, and these should be alleged.⁶¹ The facts that operate as a waiver may be either an expression of consent by the defendant or such conduct as gives rise to an estoppel.⁶² There is a clear distinction between facts that operate to create a duty on the defendant to pay the contract price, and those that create merely a duty to pay for value received. The first raises a contract debt (or a duty to perform as promised); the second raises a quasi-contract or non-contract debt, the sum due being measured by the value received. The second is not a case of waiver at all.⁶³ Both the first and the second must likewise be dis-

⁵⁷ *Smith v. Mathews Const. Co.* (1919, Cal.) 179 Pac. 205.

⁵⁸ *Nolan v. Whitney* (1882) 88 N. Y. 648; *Pitcairn v. Philip Hiss Co.* (1902, C. C. A. 3d) 113 Fed. 492; *Jones & H. Co. v. Davenport* (1901) 74 Conn. 418, 50 Atl. 1028; *Hayward v. Leonard* (1828, Mass.) 7 Pick. 181; *Palmer v. Britannia Co.* (1901) 188 Ill. 508, 59 N. E. 247; *Ashley v. Henahan* (1897) 56 Oh. St. 559, 47 N. E. 573.

⁵⁹ Where the vendor has promised to convey a farm containing a certain number of acres and it turns out that there is a small deficiency, specific performance with compensation will be decreed. *King v. Bardeau* (1822, N. Y.) 6 Johns. Ch. 38; *Foley v. Crow* (1872) 37 Md. 51; *Dyer v. Hargrave* (1805, Eng. Ch.) 10 Vesey, 505; *Creigh v. Boggs* (1882) 19 W. Va. 240.

Such a decree is refused where the deficiency is too great. *Wetmore v. Bruce* (1890) 118 N. Y. 319, 23 N. E. 303; *Lombard v. Chicago Congregation* (1872) 64 Ill. 477.

⁶⁰ See note 64, *infra*.

⁶¹ *Allen v. Burns* (1909) 201 Mass. 74, 87 N. E. 194; *Herdal v. Sheehy* (1916) 173 Cal. 163, 159 Pac. 422; *Daley v. Russ* (1890) 86 Cal. 114, 24 Pac. 867.

⁶² See above, *Waiver of Conditions*, 754.

⁶³ The mere user of a building that is not substantially in accord with the contract is not usually a waiver at all. Yet it does show that the defendant has

tinguished from facts that operate as a discharge of the defendant's counterclaim against the plaintiff. The first two determine the defendant's duty to the plaintiff; the third affects the plaintiff's duty to the defendant. A condition precedent to the defendant's duty can be waived by him without consideration; it is generally held impossible for him thus to discharge the other party's duty to him.

(5) What constitutes substantial performance must be determined with reference to the particular facts in each case. The question is always one of degree and its solution must be doubtful in many cases. If the defendant has himself regarded the deviation as not going to the essence, this will generally be decisive for the court. The ratio of damage done to benefits received will be considered. The degree of moral delinquency on the plaintiff's part will go far to resolve doubts: Has the plaintiff wilfully regarded his contract as a "scrap of paper"? Was his non-performance intentional but caused by difficulties and hardships? Was his breach an unconscious one? Was he grossly negligent or reasonably prudent? It is frequently said any *wilful* breach on the plaintiff's part will prevent any recovery by him against the defendant.⁶⁴ This is altogether too strong a statement. Even while laying down such a principle, the court is nevertheless considering the degree of non-performance and the degree of moral delinquency.

Personal satisfaction as a condition. One party to a contract may expressly promise that he will do his work to the personal satisfaction of the promisee. There is nothing improper about such a promise, and for failure to perform as agreed and to satisfy the promisee the latter should certainly be entitled to damages. It does not follow, however, that the defendant's duty to pay the contract price is conditional upon such personal satisfaction. It may be made so in express terms, as where the defendant promises to pay "on condition" that he is satisfied or "after" he is satisfied.⁶⁵ A doubt has sometimes been expressed

received value, for which he ought to pay if such value is greater than the damage caused by the plaintiff's faulty performance. The cases very generally fail to make the distinction pointed out above, even though the measure of recovery depends upon it. See the cases in note 58, *supra*.

⁶⁴ *Gillespie Tool Co. v. Wilson* (1888) 123 Pa. 19, 16 Atl. 36; *Van Clief v. Van Vechten* (1892) 130 N. Y. 571, 29 N. E. 1017; *Spence v. Ham* (1900) 163 N. Y. 220, 57 N. E. 412; *Elliott v. Caldwell* (1890) 43 Minn. 357, 45 N. W. 845; *Cornish & Co. v. Dairy Ass'n.* (1901) 82 Minn. 215, 84 N. W. 724; *Drew v. Goodhue* (1902) 74 Vt. 436, 52 Atl. 971; *Thompson v. Brown* (1898) 106 Ia. 367, 76 N. W. 819; *Main v. Oien* (1891) 47 Minn. 89, 49 N. W. 523; *Ponce v. Smith* (1892) 84 Me. 266, 29 Atl. 854; *Hathaway v. Lynn* (1889) 75 Wis. 186, 43 N. W. 956; *Desmond-Dunne Co. v. Friedman-Doscher Co.* (1900) 162 N. Y. 486, 56 N. E. 995.

⁶⁵ *Williams Mfg. Co. v. Standard Brass Co.* (1899) 173 Mass. 356, 53 N. E. 862; *Fire Alarm Co. v. Big Rapids* (1889) 78 Mich. 67, 43 N. W. 1030.

If the satisfaction required is that of some third party, the court is much

whether there is any genuine contract in such a case;⁶⁶ but the doubt seems not to be well founded, for the state of the promisee's mind is a fact to be ascertained by the jury on evidence introduced, and the defendant is not privileged not to pay if the jury finds that he was satisfied. His denial of satisfaction would not be conclusive.⁶⁷ The doubt is well grounded, however, if the defendant's promise is merely to perform if he shall *desire* to do so, or if the defendant's own *expression* of satisfaction is made *conclusive*.⁶⁸

In construing contracts where the plaintiff has promised personal satisfaction a distinction is drawn between those where performance must be measured and judged by standards of personal taste, feeling, or sentiment, and those where the determination depends merely upon market value or mechanical fitness and utility. In the former class, if the plaintiff promised to satisfy the defendant, the latter's personal satisfaction is generally held to be a condition precedent to his duty to pay even though it is not so described in words by the parties.⁶⁹ This is because there really are no standards by which the court or jury can measure performance, and in the absence of satisfaction the performance is not regarded as "substantial." In the latter class, personal satisfaction will never be held to be a condition precedent unless it is clearly so described, and the court will be not unlikely even then to substitute the satisfaction of a reasonable man.⁷⁰ The decision will depend in part on whether the plaintiff will suffer a heavy loss or the defendant receive unjust enrichment in case personal satisfaction

more likely to hold that his personal satisfaction is a condition. *Butler v. Tucker* (1840, N. Y.) 24 Wend. 446.

⁶⁶ *Folliard v. Wallace* (1807, N. Y.) 2 Johns. 395; *Duplex Safety Boiler Co. v. Garden* (1886) 101 N. Y. 387, 4 N. E. 749.

⁶⁷ *Silsby Mfg. Co. v. Chico* (1885, C. C. D. Cal.) 24 Fed. 893; *Hartford Sorghum Co. v. Brush* (1871) 43 Vt. 528. So in *McCartney v. Badovinac* (1916) 62 Colo. 76, 160 Pac. 190, where the defendant hired a detective to investigate charges as to the theft of a diamond and promised to pay \$500 "in the event that he shall determine the questions to the satisfaction of the said McCartney," it was held that he must pay the amount when the detective proved beyond a reasonable doubt that the promisor's wife had stolen the diamond in spite of the fact that the promisor professed dissatisfaction.

⁶⁸ *Hunt v. Livermore* (1828, Mass.) 5 Pick. 395; *Hawkins v. Graham* (1889) 149 Mass. 284, 21 N. E. 312; *Great Northern Ry. v. Witham* (1873) L. R. 9 C. P. 16.

⁶⁹ *Pennington v. Howland* (1898) 21 R. I. 65, 41 Atl. 891 (portrait); *Gibson v. Cranage* (1878) 39 Mich. 49 (portrait); *Zaleski v. Clark* (1876) 44 Conn. 218 (bust); *Brown v. Foster* (1873) 113 Mass. 136 (suit of clothes); *Koehler v. Buhl* (1893) 94 Mich. 496, 57 N. W. 157 (personal services); *Crawford v. Pub. Co.* (1900) 163 N. Y. 404, 57 N. E. 16 (newspaper contributor).

⁷⁰ See *Magee v. Scott & Co.* (1899) 78 Minn. 11, 80 N. W. 781; *Folliard v. Wallace* (1807, N. Y.) 2 Johns. 395 (express condition of satisfaction with title to land).

is held to be a condition. An increasing liberality is to be noted in allowing a quasi-contractual recovery by a plaintiff in default, but this is available only where the defendant has received value and not where the plaintiff will merely suffer a heavy loss.

In a sale of goods upon a contract that the goods may be returned if not satisfactory to the buyer, personal satisfaction is clearly a condition if the article is one involving personal taste.⁷¹ It is also usually held that if the contract makes the buyer the sole judge he may return the articles even if they do not involve strictly a matter of personal taste, at least in all cases where he can place the seller in *statu quo*.⁷² When the consideration furnished is of such a nature that its value will be largely or wholly lost to the one furnishing it unless paid for, and it is not a matter that ordinarily involves merely personal taste, the courts are strongly inclined to hold that the satisfaction of a reasonable man is the only condition.⁷³ But if the plaintiff's work and material are to result in something involving personal taste or comfort the genuine dissatisfaction of the promisor will defeat a recovery.⁷⁴

OFFER, OPTION, AND CONDITIONAL CONTRACT⁷⁵

An offer may be defined as an act of one party whereby he confers a power upon another to create contractual relations between them by another act called acceptance. This power is revocable by the offeror at any time prior to acceptance (or perhaps prior to the doing of some substantial act that constitutes a part of the specified acceptance). As long as it is thus revocable, the offeror having both the power and the

⁷¹ *McClure v. Briggs* (1886) 58 Vt. 82, 2 Atl. 583 (organ); *McCarren v. McNulty* (1856, Mass.) 7 Gray, 139 (bookcase); *Fechter v. Whittemore* (1910) 205 Mass. 6, 91 N. E. 155 (satisfaction to a reasonable man held sufficient).

⁷² *Campbell Printing Press Co. v. Thorp* (1888, C. C. E. D. Mich.) 36 Fed. 414 (printing-press); *Walter A. Wood & Co. v. Smith* (1880) 50 Mich. 565 (harvesting machine); *Goodrich v. Van Nortwick* (1867) 43 Ill. 445 (fanning mill); *Aiken v. Hyde* (1868) 99 Mass. 183 (gas generator); *Singerly v. Thayer* (1885) 108 Pa. 291, 2 Atl. 230 (passenger elevator); *Exhaust Ventilator Co. v. Chicago &c. R.* (1886) 66 Wis. 218, 28 N. W. 343 (exhaust fans).

⁷³ *Duplex Safety Boiler Co. v. Garden* (1886) 101 N. Y. 387, 4 N. E. 749 (express condition disregarded); *Sloan v. Hayden* (1872) 110 Mass. 141; *Hawkins v. Graham* (1889) 149 Mass. 284, 21 N. E. 312; *Doll v. Noble* (1889) 116 N. Y. 230, 23 N. E. 406; *Hummel v. Stern* (1900, N. Y.) 21 App. Div. 544, 48 N. Y. Supp. 528, aff'd 164 N. Y. 603, 58 N. E. 1088; *Lockwood Mfg. Co. v. Mason Regulator Co.* (1903) 183 Mass. 25, 66 N. E. 420; *Keeler v. Clifford* (1897) 165 Ill. 544, 46 N. E. 248.

⁷⁴ *Adams Radiator & Boiler Works v. Schnader* (1893) 155 Pa. 394, 26 Atl. 745; *Schmand v. Jandorf* (1913) 175 Mich. 88, 140 N. W. 996 (skilled service).

⁷⁵ For previous discussions by the present writer see (1917) 26 YALE LAW JOURNAL, 169, *Offer and Acceptance*, and (1914) 23 *ibid.* 641, *Option Contracts*.

privilege of destroying the power of the offeree, we do not say that there is a contract.

An option is always an offer, usually an offer to buy or to sell property, and always creates a power in the option holder. But some options are irrevocable and are then often described as "binding options." This means that the parties have created in the option holder (the offeree) a power accompanied by an immunity from revocation, and in the option giver (the offeror) the correlative liability to acceptance and disability to revoke. It does not mean that the option giver has merely a duty not to revoke, for breach of which he must pay damages. although such a duty may exist; it means that he has no power (that is, has a disability) to destroy the option holder's power. As previously shown,⁷⁶ such power and liability are frequently called "conditional right" and "conditional duty." To create such an option (or irrevocable offer) as this, either a sealed instrument or a consideration is necessary. For these reasons, a binding option may always be properly described as a contract. Observe that the acts of two persons are always necessary to create a binding option; there must be an offer and acceptance by the offeree. A mere offer is always the act of one person alone.

A binding option is always one sort of a conditional contract; but the latter is the more inclusive term. It includes any agreement that creates conditional rights and duties as heretofore explained, even though no one is given a power. Where for a consideration A has promised B to pay \$100 after his ship comes in, or after any other event not the voluntary act of B, no power is created in B and he has no option. Instead, B is said to have a conditional right and A is under a conditional duty. This, too, requires the voluntary acts of two persons, an offer and an acceptance, with either a sealed instrument or a consideration.

The terms contract and option are loosely used. The specific legal relations connoted by these terms vary with each individual case. The only safety lies in an analysis of these complex concepts into their constituent simpler concepts—right, power, privilege, immunity. Clear thinking and correct decision require this analysis.

PROOF OF CONDITIONS AND THE PAROL EVIDENCE RULE

When a written instrument containing words that are on their face unconditional, is delivered, can it be shown that the maker did not intend to create immediate rights, powers, privileges or immunities, but only conditional ones? Is parol evidence admissible to show that some fact operating as a "condition" must exist prior to any imme-

⁷⁶ See note 5, *supra*.

diate right? Does not such parol evidence contradict or vary the terms of the writing? There is no doubt that under these circumstances parol evidence is admissible.

Such evidence does not necessarily show that there is no contract at all, nor does it show that there is not yet any completed "legal act."⁷⁷ There may be a parol contract between the parties, completed so far as to be irrevocable and creating either conditional or unconditional rights and duties. The operative facts all lie in parol; they are the acts of offer and acceptance, the parol expressions of agreement. Parol evidence must prove them and is admissible to prove *all* of them, including parol conditions. Such parol expressions are completed "legal acts" with the customary operative effect.

The mere *existence* of a written instrument, however, is never *per se* an operative fact; unaccompanied by words or other acts expressing some intention, it creates no legal relations. The mere writing and

⁷⁷ The use of the term "legal act" in Wigmore on *Evidence*, sec. 2404 *et seq.* seems highly objectionable. His reason for the rule allowing parol evidence to show that a document has been delivered subject to some parol condition is that there has been no completed legal act. "The act must be *final* in its *utterance*. It does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance, there is no act."

This analysis is unfortunate in two respects. The word "act" is used to include a large number of operative facts diverse in character, and secondly the implication is suggested that prior to the "final utterance" the preliminary facts and events have no legally operative effect. Austin's definition of "act" is much to be preferred. "The bodily movements which immediately follow our desires of them are *acts*." 1 *Jurisp.* 421. "External acts are such motions of the body as are *consequent upon determinations of the will*." *Ibid.* 366. See adopting this usage, with like quotations from Justices Markby and Holmes, Professor Walter W. Cook, *Act, Intention, and Motive in the Criminal Law* (1917) 26 *YALE LAW JOURNAL*, 645. In accordance with Austin's simple and scientific definition of "act," the document is not an act at all, or any part of an act. Likewise, the condition upon which the document was to become operative may not be an act; and it is almost never an act of the person executing the instrument. It certainly should not be described as his "utterance." The occurrence of the condition, therefore, is not the completion of any act on the part of the contractor; nor are his preliminary acts inoperative to create new legal relations,—instead, they are themselves completed acts and each very often operates to create new powers and privileges and even rights and duties. The document may not yet be an operative fact in itself, and therefore does not prevent the preliminary acts and events from having their customary legal operation.

Wigmore's usage of the term "legal act" is followed by Kales, *Considerations on the Art of Interpreting Writings* (1918) 28 *YALE LAW JOURNAL*, 33, and by Aigler, *Is a Contract Necessary to Create an Effective Escrow?* (1918) 16 *MICH. L. REV.* 580.

signing of a document do not make it an operative fact; neither does the handing of it to another person to keep safely for the writer or to read and examine. The accompanying acts of the maker must always be proved in order to show what the legal operation of the instrument is, for these acts determine its legal operation. If A hands it to C saying: "Keep this for me," the *document* is not an operative fact. Its delivery, however, is such a fact, for it creates the rights and duties of bailment. If A says: "Deliver this to B. on payment of \$5000," the delivery to C is again an operative fact; as before, it is a bailment, and along with the accompanying words it creates a power in C to make the document itself an operative fact by a new delivery to B. Prior to such new delivery the document is not an operative fact at all. In order that a written instrument may exclude any parol evidence whatever, it must be shown by other parol evidence that the parties acted in such a way as to express an intention to make the *instrument* an operative fact. If parol evidence is *necessary* to show that it *ever* had any operative effect, it is surely admissible to show that it *never* had any operative effect. And wherever the instrument is not itself an operative fact, parol evidence is always admissible to show what the really operative facts were and how they operate. Rights may be shown to be conditional irrespective of the terms of the inoperative instrument; parol terms can be proved in contradiction to the terms of such an instrument. Parol evidence becomes inadmissible to contradict or vary a written instrument only after other parol evidence has shown that the parties have constituted that instrument as in itself an operative fact.⁷⁸

In *Pym v. Campbell*,⁷⁹ a writing, apparently complete and properly signed, was delivered to the plaintiff, who offered it in evidence. The defendant was allowed to prove that it was delivered to be effective only in case A should approve of the invention that was the subject of sale, and that A did not approve. Nothing was said about A's approval in the writing itself. Erle, J. said: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

Some variation may exist here in the use of the word "agreement"; but it is clear that in its proper sense there was in fact an agreement in this case, there was a valid contract, and there were numerous completed "legal acts." The parol evidence shows that there had been

⁷⁸ See *Reed v. Reed* (1918, Me.) 104 Atl. 227.

⁷⁹ (1856, Q. B.) 6 E. & B. 370,, said by Wigmore, *Evid.* sec. 2410, to be the leading case.

acts of offer and acceptance indicating a true meeting of minds, that these acts had the same legal operation as in the making of any other contract, and that there was a valid contract made.⁸⁰ It showed further that the terms of the contract as made were not identical with those written on the paper, and it most certainly contradicts and varies the terms of the paper. It is permitted to do this, however, for the reason that the paper itself is not yet an operative fact at all, and it is not an operative fact because the parties have in fact agreed that it shall not be. The rights of each party under the existing parol contract are conditional rights; the approval of A was made a condition precedent to the existence of immediate and instantly enforceable rights and duties. Had the formal document ever been agreed upon as the complete and final memorial of their agreement, it would then itself be an operative fact; the parol evidence rule would have caused it to operate to exclude proof that A's approval was to be a condition.⁸¹

It has been sometimes supposed that the parol evidence rule will permit proof of a condition precedent, but will exclude proof of a condition subsequent. Thus in a case holding parol evidence admissible to show that a deed placed in the hands of the grantee was to be ineffective until all the heirs signed,⁸² the court said: "but where the mutually understood intention was to give title immediately on delivery, subject to the condition subsequent that other heirs should sign, the non-performance of the condition cannot be set up to defeat the absolute terms of the deed. Of course, a *condition subsequent* is not effective." As shown heretofore, precedent and subsequent are relative terms. In the present connection it is correct to say that any fact can be proved by parol if it was agreed upon as a condition precedent to the document's becoming in itself an operative fact; but if it was not precedent to that, it cannot be proved in variance of the instrument, even though it may have been orally agreed upon as a condition precedent to the existence of instant rights and duties. Thus if A agrees to pay for a chattel on condition that X shall approve, the approval of X is a condition precedent to the duty to pay; and yet this condition could not be proved by parol in case A has delivered a written docu-

⁸⁰ See in accord, T. Baty, *Loan and Hire*, 6.

⁸¹ Other similar cases are *Wallis v. Littell* (1861) 11 C. B. N. S. 369 (assignment of a lease conditional on consent of landlord); *Stanley v. White* (1896) 160 Ill. 605, 43 N. E. 729; *Wilson v. Powers* (1881) 131 Mass. 539 (payee of note gave written extension, on the parol condition that the sureties should consent); *Robertson v. Rowell* (1893) 158 Mass. 94, 32 N. E. 898 (note delivered to payee on parol condition that X should indorse) *Burke v. Dulaney* (1894) 153 U. S. 228, 14 Sup. Ct. 816; *Burns v. Doyle* (1899) 71 Conn. 742, 43 Atl. 483; *Chipman v. Tucker* (1875) 38 Wis. 43; *Bowser v. Fountain* (1915) 128 Minn. 198, 150 N. W. 795. Like other conditions this kind of a condition can be waived. *California R. G. Assn. v. Abbott* (1911) 160 Cal. 601, 606, 117 Pac. 767.

⁸² *Stanley v. White*, *supra*.

ment referring to no such condition, with the intention of making the document instantly operative. The non-approval by X would indeed be subsequent to the delivery of an operative document; but the approval of X, if it could be proved at all, would be a condition precedent to any enforceable duty to pay. Whenever the document has not been agreed upon and delivered as in itself an operative fact, it excludes no parol proof whatever, of facts that operate either as conditions precedent or as conditions subsequent.